

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 351
Judiciary

(Delegate Grammer, *et al.*)

Criminal Procedure - Government Drone Use - Limitations

This bill regulates and restricts the use of a “drone” by an agent of the State or political subdivision of the State (“agent”). The use of a drone by an agent must fully comply with all applicable federal requirements and guidelines, including those issued by the Federal Aviation Administration (FAA) requirements and guidelines. A drone operated by an agent may not be equipped with a weapon.

The bill defines a “drone” as (1) unmanned aerial vehicle or aircraft that is operated without the possibility of direct human intervention from within or on the aircraft or (2) an unmanned underwater vehicle that is operated without the possibility of direct human intervention from within or on the vehicle

Fiscal Summary

State Effect: The bill’s requirements can be handled with existing budgeted State resources.

Local Effect: The bill’s requirements can be handled with existing budgeted local resources.

Small Business Effect: None.

Analysis

Bill Summary:

Authorized Operation of a Drone by an Agent: An agent may not operate a drone for the purpose of receiving or disclosing information acquired through the operation of the drone, unless:

- the person about whom information was acquired through use of the drone gives written consent to the disclosure;
- the drone is operated to collect information from a nonpublic area and the information is disclosed in accordance with a search warrant or in accordance with the bill's provisions;
- the drone is operated to collect information from a public area and the information is disclosed in accordance with a search warrant or an order issued by a court of competent jurisdiction if the agent offers specific and articulable facts demonstrating a reasonable suspicion of criminal activity and a likelihood that the operation of the drone will uncover the activity; or
- no part of the information and evidence derived from the operation is received in evidence in a trial, hearing, or other proceeding before a court or grand jury.

Despite the restrictions listed above, an agent is authorized to operate a drone and disclose information from the operation if:

- the agent reasonably determines that an emergency situation exists that (1) involves immediate danger of death or serious physical injury to an individual, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime and (2) requires operation of a drone before a warrant or an order authorizing the operation can be obtained with due diligence;
- there are grounds on which a warrant or an order likely would be granted to authorize the operation; and
- an application for a warrant or an order approving the operation is made within 48 hours after the operation begins.

The operation of a drone without a warrant or court order as described above must terminate immediately when the information sought is obtained or when the application for the warrant or order is denied, whichever is earlier. If the application for the warrant or order is denied, the information obtained from the operation must be treated as if it was obtained in violation of the bill's provisions.

Authorized Data Collection by a Drone: A drone that is operated in compliance with the bill's provisions must be operated in a manner to collect data only on the target of the operation and to avoid data collection on individuals, homes, or areas other than the target. A drone may not use facial recognition or other biometric-matching technology on an individual who is not a target of the operation.

Data collected on an individual, a home, or an area other than the target of the operation may not be used, copied, or disclosed for any purpose and must be deleted as soon as possible, but no later than 24 hours after collection.

Warrants and Court Orders for Drone Operation: A court order issued for the operation of a drone in a public area may not be in effect for longer than 48 hours but may be extended by a judge for up to 30 days if the judge deems the extension necessary to achieve the purposes for which the order was granted.

In seeking a court order or warrant, an agent may include in the application a request for an order delaying the notification required for a period not to exceed 30 days. The court must grant the request for delay if the court determines that there is reason to believe that notification of the existence of the court order may (1) endanger the life or physical safety of an individual; (2) cause the target to flee from prosecution; (3) lead to the destruction of or tampering with evidence; (4) intimidate a potential witness; or (5) otherwise jeopardize an investigation or unduly delay a trial. The court is authorized to grant extensions of a delay of notification of up to 30 days each on application or recertification of an application by the agent. Once the delay of notification expires, the agent must serve or deliver by registered first-class mail a copy of the warrant or order on each person on whom information was collected with a notice containing specified information.

If a disclosure of information is in violation of the bill's provisions, no part of the information acquired and no evidence derived from that information may be received in evidence in a trial, a hearing, or any other proceeding in or before a court or grand jury.

Unauthorized Disclosure of Information by Agent and Disciplinary Actions: A willful disclosure or use by an agent of information beyond the extent permitted is a violation of the bill's provisions, and the court or an appropriate department or agency must initiate proceedings to determine whether disciplinary action against the agent is warranted upon a finding that (1) the agent violated one of the bill's provisions and (2) the circumstances surrounding the violation raise serious questions about whether the agent acted willfully or intentionally with respect to the violation.

Reporting Requirements: In June of each year, an agent that used a drone during the previous year is required to report to the General Assembly and make public on its website specified information regarding the frequency of drone use, types of data collected on

individuals or areas other than targets, the total cost of the drone program, and the number of arrests resulting from information gathered through drone use and the offenses for which arrests were made.

Current Law: Chapter 164 of 2015 established that only the State may enact a law or take other official action to restrict, prohibit, or otherwise regulate the testing or operation of unmanned aerial systems (UASs). The authority of a county or municipality to prohibit, restrict, or otherwise regulate the testing or operation of UASs is preempted by this law, and any prior enacted local laws are superseded. It required the Department of Commerce, in consultation with the University of Maryland, the Maryland Department of Transportation, and other specified parties, to report to the General Assembly by December 31, 2015, on the economic, environmental, agricultural, and other benefits of UASs/unmanned aerial vehicles (UAVs) and to identify general policies that should be developed to address public safety, privacy, emergency management, property rights, and economic issues. That report has not yet been submitted.

With respect to warrants, a circuit court or District Court judge may issue a search warrant whenever it is made to appear to the judge that there is probable cause to believe that (1) a misdemeanor or felony is being committed by a person or in a building, apartment, premises, place, or thing within the jurisdiction of the judge or (2) property subject to seizure is on the person or in or on the building, apartment, premises, place, or thing.

An application for a search warrant must be in (1) writing; (2) signed and sworn to by the applicant; and (3) accompanied by an affidavit that sets forth the basis for probable cause and contains facts within the personal knowledge of the affiant that there is probable cause.

Any search and seizure made under the authority of a search warrant must be made within 15 calendar days after the day the warrant was issued. A search warrant is void after this 15-day period.

Background: UAVs, or “drones” as they are commonly known, have become increasingly popular devices, and not just among aviation hobbyists. These aerial vehicles come in various sizes, ranging from the size of an insect (nanodrones or micro-UAVs) to the size of a jetliner. Drones are operated by remote control with personnel on the ground and/or autonomous programming. The entire system required to operate a drone – the personnel, the programming or digital network, and the aircraft – is referred to as a UAS.

UAVs have been used in numerous applications, including photography, firefighting, surveillance, warfare, search and rescue, wildlife tracking, and border patrol. In the United States, the FAA has approved certificates of authority to operate UAVs on a case-by-case basis for some commercial and other entities.

Federal Oversight: The FAA Modernization and Reform Act, enacted in 2012, required the U.S. Secretary of Transportation to develop a plan, by September 30, 2015, to accelerate safe integration of UASs into the national airspace. Although the Act required a final rule by September 30, 2015, the FAA did not issue a Notice of Proposed Rulemaking until February 2015. The FAA has publicly stated that it could take as long as 16 months to develop and issue a final rule. Accordingly, a final rule is not likely until the end of 2016 or early 2017.

On October 19, 2015, federal officials announced that UAV owners will be required to register their aircraft with the federal government. The registration requirement is in part an effort to increase accountability amid reports of UAVs interfering with commercial aircraft and concern over the potential threat UAVs pose to aviation safety. The U.S. Department of Transportation and the FAA formed a task force to develop the registration process, including determining which aircraft should be exempted from registration. The task force submitted its final report on November 20, 2015. Effective December 20, 2015, anyone who owns a small unmanned aircraft of a certain weight must register with the FAA's online Unmanned Aircraft System registry before the aircraft is flown outdoors. People who previously operated their UAS must register by February 19, 2016. Failure to register may result in civil and criminal penalties.

State Activity: In the absence of definitive federal guidance about the incorporation of UAVs into the national airspace, states are faced with managing the potential of UAVs to enhance emergency management, public safety, and agricultural and other commercial operations, and managing the detriment to public safety that may be imposed by the increasing availability and use of UAVs. According to the National Conference of State Legislatures, 26 states have laws on UAS issues, and an additional 6 states have adopted resolutions. In 2015, at least 45 states, including Maryland, have considered at least 156 bills about UAVs. Nineteen of the 26 states (Arkansas, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia) enacted such legislation in 2015. The laws enacted by most states relate to defining UAVs and/or UASs, prohibiting activities that could invade privacy, and specifying authorized uses for law enforcement, hunting, and the general public.

Fourth Amendment Concerns: The Fourth Amendment to the U.S. Constitution states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”. In essence, the Fourth Amendment protects individuals from unreasonable searches and seizures by the government. The reasonableness of a governmental search often depends on the location of the search and the reasonableness of the expectation of privacy on the part of the person subject to the search. Generally, U.S. Supreme Court decisions have held a warrantless search as unreasonable when it involves a person's home, including the immediately

surrounding property or “curtilage” attached to the home. On the other hand, courts have also held that the Fourth Amendment does not protect individuals from searches that take place in “open fields” because it is unreasonable for a person to have an expectation of privacy over activities that take place in those areas. As of this writing, there is no U.S. Supreme Court case that directly addresses unmanned aerial surveillance in governmental searches.

Public Safety Concerns: In August 2015, two men with a UAV were arrested near the Western Correctional Institution near Cumberland, Maryland. The men were preparing to use the UAV to fly drugs, tobacco, and pornography into the prison. This is the first reported incident of its kind in Maryland, although similar incidents have occurred in Ohio, California, and other locations. The Department of State Police (DSP) reports that generally, Maryland has not had many of the public safety incidents involving UAVs that have occurred in other states. As the availability and popularity of UAVs continues to grow, however, their presence will likely require new enforcement strategies in Maryland.

State Expenditures: DSP advises that it can meet the bill’s requirements with existing budgeted resources. According to DSP, the Office of the State Fire Marshal uses UAVs for bomb squad incidents and to document fire scenes where it is unsafe to enter a structure.

The Natural Resources Police (NRP) advises that the bill does not have an immediate operational or fiscal impact on NRP because it has refrained from purchasing unmanned aircraft until federal and State rules are established. However, according to NRP, the bill may impact future savings. NRP advises that the bill’s provisions appear to be more restrictive than those pertaining to manned aircraft, and NRP estimates that if unmanned aircraft are able to be freely substituted for manned aircraft, the agency could reduce aircraft operations by 15%.

The Comptroller’s Office advises that the bill does not have a fiscal impact on the office because its Field Enforcement Division does not currently use drones and does not have any of them. However, the office also advises that the bill’s restrictions may decrease future revenues should the office employ drones in surveillance activities in the future.

The Maryland Transportation Authority advises that it can handle the bill’s requirements with existing resources should it ever acquire a UAV.

The Judiciary advises that the fiscal and operational impact of the bill is difficult to project because of uncertainty with respect to the number of additional filings the courts will receive.

Local Expenditures: Overall, it is anticipated that the bill can be implemented by local governments with existing resources. Charles County advises that while its Sheriff’s

Office does not anticipate a fiscal impact from the bill, its State's Attorney's office may be impacted from increased reviews of warrant applications. The Montgomery Police Department and the Montgomery County Sheriff's Office do not anticipate a fiscal impact from the bill.

Additional Information

Prior Introductions: HB 847 of 2014, a similar bill, received an unfavorable report from the House Judiciary Committee. Its cross file, SB 926, received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: None.

Information Source(s): Charles and Montgomery counties, Comptroller's Office, Judiciary (Administrative Office of the Courts), University System of Maryland, Department of Natural Resources, Department of State Police, Maryland Department of Transportation, Federal Aviation Administration, National Conference of State Legislatures, Department of Legislative Services

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